Utility Financing of Energy Conservation: Can Loans Only Be Made through an Investor-Owned Utility?

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I. INTRODUCTION

A primary component of contemporary increases in electricity rates is the dramatic inflation in capital costs associated with new generation. Many factors have served to fuel this surge, including new federally mandated pollution control equipment coupled with

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3. C. KOMANOFF, supra note 2, at 235.

4. Id. at 2-3.
rapidly escalating interest rates. Indeed, the “shock” associated with placing newly completed generating capacity into a utility’s rate base has caused substantial recent regulatory concern.

One mechanism frequently proposed to combat increasing electric rates is the development and implementation of “full energy services.” These services include utility participation in the provision of such things as energy conservation, load management, and renewable resource devices. Proponents of these services assert that the measures can provide the same end energy results to consumers at a lesser cost than conventional power sources.

Increasingly, legislative and administrative decisionmakers are recognizing the importance of this ability to “substitute” among energy services. For example, in 1977 the Oregon legislature approved a statute which provided that:

(3) Insulation and other weatherization measures in many cases can conserve energy and make it available for other uses at less cost than energy from new sources.

(4) Expenditures by energy suppliers on conservation programs is in many cases a prudent and cost-effective means of gaining new supplies for energy consumers.

Similarly, the New York legislature enacted a program that provides for utility financing of energy conservation measures. That legislation stated in relevant part that the program would benefit “all energy users and consumers in this state since the demand for highly priced incremental sources of energy will be reduced.” The legislature noted that “savings to homeowners would be in terms of millions of dollars per year; jobs would be created; and energy supplies would be saved for wiser use.”

State utility regulators are also beginning to pursue the concept of

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5. Komanoff found that “the contribution of [interest during construction] to plant cost rose by about 40 percent from 1971 to 1978 and is projected to double overall from 1971 to 1988. C. KOMANOFF, supra note 2, at 245. For coal fired plants, the interest during construction share of total costs increased from 5.9 percent to a projected 10.4 percent from 1971 to 1988. Komanoff concluded, however, that when costs were viewed in real (i.e., inflation-adjusted) terms, the “increases in IDC account for only a small fraction of real past and projected future increases in nuclear and coal costs.” Id.


7. See, e.g., Schroeder & Miller, The Validity of Utility Conservation Programs According To Generally Accepted Regulatory Principles, 3 SOLAR L. REP. 967 (1982).


10. Act of July 28, supra note 9. See also infra notes 142-44 and accompanying text.


12. Id. at § 1(5).
full energy services. The Idaho Public Service Commission approved a utility financed residential energy conservation program that included zero interest loans. The Commission stated that: "[t]he rationale for the zero interest loan offer is quite simple. The cost of new generating plants and transmission lines has now become so high that it is cheaper for Idaho utilities to augment existing electricity supplies by financing efficiency improvements instead of new plant investment."\(^{13}\) Other state utility regulatory commissions, making like findings, have ordered similar conservation financing programs.\(^{14}\) Moreover, many public and private utility companies have initiated finance programs on their own.\(^{15}\)

In the past several years, the primary controversy regarding utility-financed energy conservation programs has been over whether companies could be directed to provide such programs against their will. In Iowa, the supreme court sustained an industry challenge to mandatory conservation financing by saying that such a program was beyond the "traditional" realm of utility regulation and utility service.\(^{16}\) The court held that it was beyond the statutory authority of the state utility commission to adopt mandatory utility financing without legislative approval of such a program.\(^{17}\)

The District of Columbia Public Service Commission similarly dis-approved an involuntary utility financing program.\(^{18}\) The Commission held that financing was not "essential" to the provision of electricity and natural gas, and that the authority to require such utility activity was not inherent in the broad grant of power to "regulate the rates and services" of utility companies.\(^{19}\)

In spite of this historical opposition to financing programs, industry analysts are becoming progressively more attuned to the need to have utilities provide services other than electricity and natural gas. Ana-


\(^{16}\) Iowa-Illinois Gas & Elec. Co. v. Iowa State Commerce Comm'n, 334 N.W.2d 748 (Iowa 1983).

\(^{17}\) Id. at 753.


\(^{19}\) Id. at 539-85.
lysts are now saying that the promotion of energy conservation and small power production would provide the utility industry with increased flexibility in the commitment of capital during times of high interest rates and uncertain demand. In addition, the dollar commitments to these types of full energy services would place a lesser burden on a financially strapped industry. The industry is increasingly beginning to realize that the benefits of utility involvement in non-traditional energy services are high while the costs are low.

While the move toward utility participation in energy conservation financing gains momentum throughout the country, however, a new problem has arisen for publicly-owned utilities. Even for those companies that are willing to provide financing programs, some concern has arisen over whether public power entities have the same flexibility to offer such programs as do investor-owned companies. For example, legal counsel for the Lincoln (Nebraska) Electric System (LES) informed that utility:

> It would be extremely difficult, if not impossible, for the Lincoln Electric System, City of Lincoln, to develop and implement a scheme of financing for making loans to its customers which would not be violative of ... constitutional mandate. ... [T]he Nebraska Constitution clearly forbids the Lincoln Electric System ... from extending any credit to its customers for the purchase of energy conservation measures.

The issue is raised by state constitutional restrictions on the use of public credit. For example, the Nebraska Constitution provides that “[t]he credit of the state shall never be given or loaned in aid of any

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23. The issue to which this Article is directed thus regards whether a public power entity, such as a municipal utility or a public power district that desires to offer energy conservation financing, has the constitutional authority to do so in light of restrictions on lending the state’s credit. The issue, in this respect, differs from that situation involving a state regulatory body compelling a public utility to provide financing against its will.

> prohibit[s] a city or public utility district from assisting its utility customers, generally, in the purchase of such conservation materials as insulation or storm windows from private suppliers by providing to the seller a guarantee of payment of part or all of the agreed upon purchase price for the conservation materials involved.

Id. at 1.
individual, association or corporation . . . ". Similar provisions exist in the constitutions of forty-seven states. The treatment of the constitutional proscription by the Nebraska Supreme Court clearly indicates the problems that such provisions might raise for financing programs offered by publicly-owned electric utilities. In *State ex rel. Beck v. City of York*, the court said that "[t]he prohibition clearly provides that the credit of the state may not be given or loaned to an individual, association or corporation under any circumstances." The court further held that the prohibition extended to all political subdivisions of the state, and that it encompassed revenue bonds as well as general obligation bonds.

The purpose of this Article is to examine this constitutional proscription on lending the credit of the state as it applies to energy conservation financing programs offered by publicly-owned electric utilities. Since all electric utilities in Nebraska are publicly-owned, as required by state law, the Article will use the Nebraska constitutional provisions as the basis for analysis. Appropriate comparisons and contrasts to other state constitutional provisions will be noted throughout the Article. To the extent that constitutional restrictions may prevent municipal utility loans to electric customers, utility financing of energy conservation measures may be limited to the investor-owned utilities (IOUs).

The tenor of the constitutional provisions to be explored in this Article is to prohibit the lending of a state's credit to any individual, association, or corporation. The extent to which such constitutional limitations prohibit energy conservation financing by publicly-owned utilities is to be determined through an examination of the language of the proscription. The constitutional provision establishes three elements that are essential to establish its applicability. First, there must be "credit" involved. Second, the credit must be that "of the state." Third, the credit must be "given or loaned." Each of these constitutional issues will be examined in depth. First, however, it is necessary to gain a historical perspective on the constitutional provision so as to ascertain the policies to be promoted through its application.

II. HISTORICAL DEVELOPMENT OF CREDIT RESTRICTIONS

As the United States expanded rapidly to the West during the 1800s, one of the major undertakings was to provide for a new infra-

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26. *NEB. CONST.* art. XIII, § 3.
28. 164 Neb. 223, 82 N.W.2d 269 (1957).
29. *Id.* at 226, 82 N.W.2d at 272.
30. *Id.* at 225, 82 N.W.2d at 271.
31. *Id.* at 227, 82 N.W.2d at 272.
structure that included transportation and communication facilities. State and local governments, to promote this development, and to assure that development occurred in their areas, offered significant financial inducements. These inducements came in the form of government granted loans, the issuance of bonds, and the guarantee of credit.\textsuperscript{33} The magnitude of this public investment was substantial. The New Mexico Supreme Court later spoke of the “mania for extending public aid to private corporations,”\textsuperscript{34} while the Arizona Supreme Court referred to the “orgies of extravagant dissipation of public funds.”\textsuperscript{35}

The grant of public funds to assist in the construction and provision of such facilities led to acute financial difficulties beginning in the 1830s. An economic depression swept the United States during these years, which resulted in the bankruptcies of several railroads and the subsequent defaults on debts secured by the states.\textsuperscript{36} The prior commitment of funds led many states to the verge of bankruptcy themselves.\textsuperscript{37} An example of this phenomenon occurred in New York. In 1840, to encourage the construction of the Long Island Railroad, the New York legislature enacted a statute authorizing the railroad to sell certificates that would be insured by the state and reimbursable at its pleasure any time after the expiration of twenty years. In 1858, the New York legislature fixed a payment date fifteen years after the expiration of the first twenty years. The validity of this extension of the obligation was brought before the New York Court of Appeals.\textsuperscript{38} The court found that the 1858 action of the legislature was valid, thereby forcing the holders of the certificates to wait a total of thirty-five years for redemption. The action of the legislature, while unpopular with


\textsuperscript{34} City of Clovis v. Southwestern Pub. Serv. Co., 49 N.M. 270, 276, 161 P.2d 578, 882 (1945) (quoting Murphy v. Dever, 320 Ill. 186, 188-89, 150 N.E. 663, 663-64 (1926)).

\textsuperscript{35} City of Tempe v. Pilot Properties, Inc., 22 Ariz. App. 356, 360, 527 P.2d 515, 519 (1974) (quoting Thaanum v. Bynum Irr. Dist., 72 Mont. 221, 227, 232 P. 528, 530, (1925)). One commentator quantified the extent of this financial commitment. He noted that Kentucky counties and towns incurred a debt of $13 million to assist railroad construction; 86 counties in Illinois provided a railroad subsidy of over $16 million; and municipalities in Kansas contributed over $12 million to the railroad industry. See Comment, \textit{State Constitutional Limitations}, supra note 33, at 97.

\textsuperscript{36} Carruthers v. Port of Astoria, 249 Or. 329, 334, 438 P.2d 725, 727 (1968).


\textsuperscript{38} People \textit{ex rel. De Forest v. Denniston}, 23 N.Y. 247 (1861).
the holders of the certificates, was probably an effort to avoid an out and out default that would have required the taxpayers to come to the rescue.39

As a result of these financial debacles of the 1800s, nearly every state adopted constitutional proscriptions on the lending of the credit of the state to private enterprise. According to the New Mexico Supreme Court, the "essence" of these constitutional provisions "was to restrict the activities and functions of the state, county, and municipality to that of government, and forbid their engaging directly or indirectly in commercial enterprises for profit."40 These constitutional provisions were designed to protect the state treasury, and the state taxpayers, against losses resulting from the failure of such a private undertaking guaranteed by the state.41

Thus, in examining the lawfulness of a conservation financing program to be offered by a publicly-owned utility, it is necessary to determine whether such a program would bring about any liability of the citizens for the levy of some tax, or whether such a program would impose a financial burden upon the citizens of the community that owns the utility. It is to these issues that this Article will be directed.

III. THE CONSTITUTIONAL ANALYSIS

Energy conservation financing programs, when undertaken by publicly-owned entities such as a municipal utility, raise possible constitutional problems. A recent exploration of the issue for the Nebraska Energy Office found that forty-seven states had some type of constitutional restriction on the lending of the credit of the state to private entities.42 Concern has been raised that these provisions serve to bar the pursuit of financing programs. In states where public ownership is common, the constitutional bar, if it exists, could raise serious barriers to a utility move toward the provision of full energy services.

Three elements must be present for the constitutional proscription to be applicable. There must be "credit" involved; the credit must be

41. See also supra notes 33-35 and accompanying text. Historically, the constitutional prohibition on lending the credit of the state sought only to bar the state acting as a surety for private industry: "Manifestly, the only purpose of this provision is to prohibit the state from acting as a surety or guarantor of the collateral obligation of another party." State ex rel Thomson v. Giessel, 271 Wis. 15, 29, 72 N.W.2d 577, 584 (1955). See generally Grout v. Kendall, 195 Iowa 467, 192 N.W. 529 (1923); State ex rel O'Connell v. Public Util. Dist. No. 1, 2 Wash. App. 356, 469 P.2d 922 (1970).
42. GRENIER & COLTON, supra note 25, at 87-137.
that “of the state”; and the credit must have been “given or loaned.” Each of these elements will be examined in depth below.

A. Does a Conservation Financing Program Involve the Public “Credit”?

The determination of whether public “credit” is involved with an energy conservation financing program is to be made based on a multi-level inquiry. The Nebraska Supreme Court, in *State ex rel. Beck v. City of York*, addressed in some detail the circumstances under which public “credit” would be found to be implicated in a financing program. The court held:

The issuance of the bonds in the name of the city for the payment of the cost of the project evidences the fact that the credit of the city has been extended.

The city is the payer of the bonds and it is primarily liable for their payment.

The bonds become the obligations of the city. . . . A failure of payment is a default by the city.44

Several indices thus guide whether public credit has been extended.45 First, there must be some evidence of indebtedness incurred on the part of the public body. Generally issued in the form of revenue bonds, those bonds “are issued by the city in its own name to give them a marketability and value which they would otherwise not possess.”46 Second, the indebtedness must be a legal obligation of the city whereby the city is held to be a payer of the indebtedness. Use of the city as such a payer “is intended to given respectability to [the bonds] because of the general acceptability of cities as a source of bond issues in financial markets.”47

43. 164 Neb. 223, 82 N.W.2d 269 (1957).
44. Id. at 226, 82 N.W.2d at 272.

48. Id.
The Nebraska courts, however, distinguish between the use of state monies and the use of state credit. The two words are not used coterminously in Nebraska and the constitutional restrictions differ as well. Public money cannot be spent unless it is for a "public purpose." In contrast, the credit of the state "may not be given or loaned" to private interests "under any circumstances." The distinction between the use of public monies and public credit could be of value in establishing the validity of an energy conservation financing program. Such a program need not involve the elements of loaning public credit. A program of financing funded through current operating funds, for example, would not invoke the prohibition on lending the credit of the state. No debt is incurred, and no repayment obligation is imposed. Rather the cost of the program would be payable from ongoing revenues. The Nebraska Supreme Court has directly addressed the treatment of such "operating expenses" in light of that state's constitutional financial restrictions. In *United Community Services v. Omaha National Bank*, the court held that "[i]n this jurisdiction, under the general power granted public corporations, the revenues derived are required to be devoted to the purposes for which the corporation is being operated, that is, the payment of operating expenses and improvements of the facilities." The Court held that even charitable contributions by a municipal corporation could be considered "operating expenses" if they "bring some benefits to the district.

Clearly, this language still leaves a number of issues to be resolved on a case-by-case basis before a conservation finance program could be unequivocally approved. A public utility would need to establish that

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49. "Our organic law prohibits the expenditure of public money for private purpose. It does not matter whether the money is derived by ad valorem taxes, by gift, or otherwise." *Id.* at 229, 82 N.W.2d at 273.
50. "When the State or a political subdivision thereof becomes a payor of a revenue bond or any other evidence of indebtedness which is to be used in the accomplishment of a private as distinguished from a public purpose, the credit of the State has been given or loaned . . . ." *Id.* at 226-27, 82 N.W.2d at 272.
51. *Id.* at 229, 82 N.W.2d at 273.
52. *Id.* at 226, 82 N.W.2d at 272 (emphasis added). The Nebraska Supreme Court distinguishes between the public money and the public credit, stating: "The manufacturing of sugar and chicory is a private enterprise, and the public money or credit cannot be given or loaned in aid of any individual, association, or corporation carrying on such enterprises." *Id.* at 230-31, 82 N.W.2d at 274 (emphasis added) (quoting *Oxnard Beet Sugar Co. v. State*, on *reh*', 73 Neb. 66, 68, 105 N.W. 716, 717 (1905).
54. 162 Neb. 786, 77 N.W.2d 576 (1956).
55. *Id.* at 794-95, 77 N.W.2d at 584. See also *State ex rel Meyer v. Duxbury*, 183 Neb. 302, 160 N.W.2d 88 (1968).
the provision of conservation, load management, and renewable resource devices is among the "purposes for which the corporation is being operated."57 In contrast, the utility could seek to establish that the implementation of such nontraditional energy measures would involve the "improvement of the [utility's] facilities."58 In either case, to the extent that an energy conservation financing program could be funded out of current operating revenues, no debt would need to be incurred and no constitutional restrictions would apply.

Mechanisms exist to fund such a financing program out of current operating revenues. For example, a simple surcharge placed on current rates could raise the additional necessary capital in a way which, in the long-term, would minimize rates to consumers.59 Such a surcharge, used to finance alternatives to central station capacity expansion, might easily be justified on economic grounds.60 So long as the present value of the marginal cost of central station capacity exceeded the magnitude of the surcharge, ratepayers would receive financial and economic benefits from the conservation program.61 In any event, no constitutional barrier would exist to the pursuit of such an endeavor.

Not all state courts would require their publicly-owned utilities to go to such efforts to avoid incurring public "credit" as contemplated by constitutional restrictions. While not unique in its construction of the term "credit,"62 the Nebraska courts are clearly part of minority opinion in holding that the issuance of revenue bonds constitutes lending the credit of the state.63 Most state courts have held that revenue financing "kept inviolate the general taxation."64 Moreover, substantial

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57. Id. at 794-95, 77 N.W.2d at 584.
58. Id.
60. Sheehan, supra note 59.
61. Reducing the level of demand saves two critical resources:
   money and time. It saves money in three ways: it saves operating costs in the short term (efficiency costs less than fuel plus O&M plus grid losses); it saves construction costs in the medium term; and it saves replacement costs in the long terms. All three savings decrease the present value of revenue requirements. Reducing demand also stretches operating reserves and operating lifetimes, postponing capacity decisions as long as possible so that more information will be available.
   Address by Amory Lovins, "Saving Gigabucks with Negawatts," 96th Annual Convention, Nat'l Assoc. of Regulatory Utility Comm'rs, Nov. 26, 1984, at 8 (emphasis in original).
63. See supra note 46.
64. Carruthers v. Port of Astoria, 249 Or. 329, 335, 438 P.2d 725, 728 (1968).
political incentives have existed recently, pushing the states toward approval of this type of financing. In 1968 the Oregon Supreme Court noted:

Heavy federal income taxes, coupled with the exemption already noted for the income from municipal securities, supplied a substantial incentive for industry to try to finance by this method. State after state has authorized one or more classes of its municipalities to offer this financing method to private industries . . . .65

Two states, in particular, have approved the issuance of revenue bonds as a means of financing by publicly-owned electric utilities.66 In Kentucky, the court considered a joint power plant construction project between the city of Owensboro and Kentucky Utilities Company. Without any discussion of the policy and law behind the holding, the court quite simply noted that "the rule is well established that the issuance of revenue bonds to finance a public project . . . does not constitute a lending of credit . . . ."67

In the Oregon case of Miles v. City of Eugene,68 the reasoning was much more apparent. In Miles, local taxpayers and ratepayers brought suit against the local utility challenging the agreement between the Eugene Water and Electric Board (EWEB) and other private utilities to share expenses for a study of the construction and operation of nuclear power facilities.69 The court rejected the constitutional challenge, holding that the state's limitation "is not a restriction upon the obtaining of funds by a municipality by the sale of revenue bonds, as distinguished from general obligation bonds."70 Several factors contributed to this decision. First, the court observed that while the EWEB was a department of the City of Eugene, the Board "operates independently through an elected Board of Commissioners. . . . City revenues cannot be used by EWEB and EWEB cannot levy taxes."71 Thus, the debt of the EWEB could not pose a general obligation to city taxpayers. Second, the court noted further that there was an express disclaimer making this separation between the utility and the city clear to the bondholders. The bonds specifically stated on their face that:

[They do not in any manner constitute a general obligation of the Eugene Water & Electric Board, or the City of Eugene, nor create a charge upon the tax revenues of said city nor of any revenues or property of said city or property of said Board but are payable solely from the general revenues of the

65. Id. at 335-36, 438 P.2d at 728.
66. See Miller v. City of Owensboro, 343 S.W.2d 398 (Ky. 1961); Miles v. City of Eugene, 252 Or. 528, 451 P.2d 59 (1969).
68. 252 Or. 528, 451 P.2d 59 (1969).
69. Id. at 529, 451 P.2d at 60.
70. Id. at 531, 451 P.2d at 61.
71. Id. at 530, 451 P.2d at 61.
The bonds thus evidenced, on their face, the protections necessary to sustain the policies of the constitutional restrictions on lending public credit. The bond issue did not seek to finance the construction of private facilities "with general obligation bonds payable from general tax levies."73

The question of whether the "credit" of the state is involved with an energy conservation financing program can be answered by resort to two separate inquiries. If the capital used in providing loans to customers comes from general operating revenues, no credit is implicated. Moreover, in most states, if the capital is derived from revenue bonds that do not represent a levy on general tax revenues, there is no grant of public "credit."

B. Does a Conservation Financing Program Involve the Credit "of the State"?

Constitutional restrictions on the use of debt financing apply only to state governments.74 To the extent that obligations are undertaken by the private sector, no constitutional prohibition exists. Moreover, a split of authority exists as to whether debts incurred by political subdivisions are to be construed as extending the credit of the state.

1. The Private Sector

Revenue bonds that expressly disclaim the general liability of the state for their repayment will not fall within the constitutional proscription on lending public credit, even if issued by a state government entity.75 In addition, to the extent that revenue bonds are backed by securities that represent the collective security of private interests, and not of the state, the credit of the state has not been given or loaned.76

The Nebraska Supreme Court directly addressed the issue of what constitutes the credit "of the state" in State ex rel. Douglas v. Nebraska Mortgage Finance Fund.77 In that proceeding, Nebraska's Attorney General attacked the constitutionality of legislation that sought to "assist private mortgage lenders in providing mortgage financing for single family residences at reduced interest rates for low
and moderate income families . . . .”78 The legislation authorized the
Nebraska Mortgage Finance Fund, a state government entity, to pur-
sue one program wherein the Fund would “make loans to mortgage
lenders which will use the proceeds to make mortgage loans” to indi-
viduals.79 The court held that “the principal function of the Fund is to
issue tax-free revenue bonds and to use the proceeds [inter alia] to
courage lenders to make lower interest loans to low or moderate
income persons . . . .”80 The court added that the state’s bonds and
resulting loans to mortgage lenders were “solely for the purpose of
making mortgage loans to persons otherwise unqualified for mortgage
financing because of insufficient personal or family income.”81 The
legislature stated expressly in the challenged Act that the Fund in-
volved “the creation of a government body.”82 Thus no question ex-
isted but that it was “the state” acting through the form of the Fund in
making loans. The legislature also stated that the Fund involved
“public money provided by the sale of revenue bonds [that] may be
borrowed, expended, advanced, loaned or granted.”83 Thus no ques-
tion existed but that “credit” was being extended to individuals. The
constitutional issue in the case was directly presented.

The Attorney General attacked the legislation as being in violation
of the constitutional proscription on lending the credit of the state.
However, the court rejected that argument and held:

If there is insufficient revenue with which to repay the bonds, the state in no
manner becomes obligated or liable. The Act specifically provides that the
bonds may not be a debt, liability or general obligation of the state, and must
contain on the face thereof a statement that neither the faith and credit nor
the taxing power of the state is pledged to the payment of the principal or
the interest on such bonds.84

The court concluded that revenue bonds that specifically deny any lia-
Bility of the state do not constitute state debt within the meaning of
the constitutional prohibition.85

In Mortgage Finance, the Nebraska Supreme Court specifically in-
dicated that bonds, the payment of which is limited to public utility
revenues,86 have “no state funds involved in the repayment of any

78. Id. at 447, 283 N.W.2d at 16.
79. Id.
80. Id. at 448, 283 N.W.2d at 16.
81. Id. at 447, 283 N.W.2d at 16.
83. Id.
84. State ex rel. Douglas v. Nebraska Mortgage Fin. Fund, 204 Neb. 445, 461, 283
N.W.2d 12, 23 (1979).
85. Id. at 463, 283 N.W.2d at 23 (citations omitted).
86. This limit is particularly important for Nebraska, where all utilities are publicly-
owned. See supra note 32 and accompanying text.
debt.” The court had previously applied this reasoning in *Carr v. Feustermacher,* to uphold utility financing of “the improvement on a light plant.” The Nebraska Court also favorably cited a Washington state court decision “where the construction of a waterworks system by a municipality was financed by obligations payable only from revenue derived from the operation of the system.”

This Nebraska Supreme Court decision was a logical extension of the reasoning first articulated by that court in a prior case concerning pollution control bonds. In *State ex rel. Meyer v. Duabury,* the court considered a challenge to the financing of the Nebraska Clean Waters Commission. The commission was “authorized to issue bonds and notes and to loan money to municipalities” so as to further its purposes of assisting “municipalities in the planning and financing of wastewater treatment works, wastewater collecting systems, and solid waste disposal facilities.”

The challenge asserted a violation of the constitutional ban on lending the credit of the state. The court rejected that argument on two grounds. First, the court observed that there was a specific and express disclaimer of any obligation on the part of the state, since “[t]he act specifically provides that the bonds and notes issued by the commission shall be general obligations of the commission, payable solely from funds of the commission available for that purpose, and not a liability of the state.” The credit of the state cannot be held to have been loaned in those situations when the state has indicated expressly that it will not be responsible for repayment. Second, the court said that it was not the credit of the state that was relied upon in the issuance of the bonds. Rather, the court found that:

> The securities which may be pledged to secure the payment of the bonds and notes to be issued by the commission are the bonds and notes of municipal corporations. The bonds and notes issued by the commission actually represent the combined or collective credit of the municipal corporations which have borrowed money from the commission.

In essence, the court held that the bonds were issued using the credit

88. 119 Neb. 172, 228 N.W. 114 (1929).
89. Id.
92. Id. at 303, 160 N.W. 2d at 90.
93. Id.
94. Id. at 304, 160 N.W.2d at 91. The other constitutional challenges raised in this case are not relevant to this discussion.
95. Id. at 307, 160 N.W.2d at 93.
96. Id.
97. Id.
of the private entities rather than the credit of the state. In such a situation, constitutional proscriptions are not violated.

Not all debtor/creditor transactions in which the state is involved necessarily implicate the credit of the state. In those situations in which the evidence of indebtedness expressly disclaims any general liability of the state, no public credit has been extended. Similarly, in those situations in which the security relied upon is the security of the private sector, no public credit is involved. In such circumstances, constitutional limitations on lending the credit of the state do not apply.

2. Political Subdivisions

While the credit of political subdivisions is frequently considered to be an item distinct from the credit of the state, this view is not unanimous.98 The Nebraska Supreme Court addressed the issue in State ex rel. Beck v. City of York.99 The purpose of the constitutional provision, the court said, was to avoid intermingling public funds with private enterprise.100 The results of such a ban were twofold. First, the inability of a government to commit public funds to private sector ventures worked to protect the public treasury.101 Tax dollars were not to be risked in speculative undertakings.102 Second, the intermixing of public and private funds undermined the free market system.103 Companies should not be required to compete with public sector capital.

Given these premises, the court said it would make little sense to allow a state to avoid the intent of the prohibition by doing indirectly what it was forbidden to do directly.104 Municipalities, as well as other political subdivisions, were mere instrumentalities of the state that could be created and destroyed at the will of the state.105 According to the court:

[P]ublic monies may not be used for private purposes. To impose such a prohibition as a matter of constitutional policy on the State, only to have its beneficient purpose thwarted by a refinement of definition not contemplated by its framers, would be to avoid the very purpose for which it was intended. It is not the function of courts to thus rewrite constitutional provisions to

98. See Redevelopment Auth. of Madison v. Canepa, 7 Wis. 2d 643, 652, 97 N.W.2d 695, 699 (1959) (geographical subdivisions of state not limited by constitutional limit on debt). See also Port Auth. of Saint Paul v. Fisher, 269 Minn. 276, 291, 132 N.W.2d 185, 194 (1964) (constitutional limit on lending credit not applicable to minor subdivisions). But see Connor v. Herrick, 349 Mich. 201, 216, 84 N.W.2d 427, 430 (1957) (constitutional limit on lending credit applies with equal force to municipalities).
99. 164 Neb. 223, 82 N.W.2d 269 (1957).
100. Id. at 225, 82 N.W.2d at 271.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id.
avoid their plain effect.\textsuperscript{106} The court said that to conclude that the state itself may not loan its credit, but that it may create a separate entity to do so "would be, to say the least, a very anomalous situation."\textsuperscript{107} It concluded that the constitutional restriction "applies to the State and all political subdivisions thereof."\textsuperscript{108}

It is not so clear, however, that to exclude political subdivisions from the coverage of constitutional limitations on lending public credit would necessarily "rewrite constitutional provisions to avoid their plain effect."\textsuperscript{109} Many states express\textsuperscript{\textit{ly}} prohibit the extension of credit by both the state and its political subdivisions.\textsuperscript{110} In Colorado, for example, the state constitution provides that "neither the state, nor any county, city, town, township or school district shall lend or pledge the credit or faith thereof . . . ."\textsuperscript{111} Other states have a more general prohibition against the extension of "state" or "public" credit,\textsuperscript{112} thus leaving open a possible construction that the intent of the provision was to apply only to the state and not to political subdivisions.\textsuperscript{113} The Minnesota Supreme Court, in construing such a general provision,\textsuperscript{114} reached precisely this latter conclusion. It held, without explanation, that the provision "is a limitation on the state, not on minor subdivisions."\textsuperscript{115} So, too, did the Wisconsin Supreme Court construe a similar constitutional proscription. That court said that "it has been held from almost the beginning that while the state is subject to the prohibition limiting the power of the state to contract a debt . . . . geographical subdivisions are not so subject."\textsuperscript{116} These holdings are to be contrasted with decisions that direct that "the express limitation on the power of the state with reference to lending its credit . . . applies with equal force to municipalities of the state."\textsuperscript{117}

The authority on this question is, without a doubt, divided. The

\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} See, e.g., ARIZ. CONST. art. IX, § 7; FLA. CONST. art VII, § 12; IND. CONST. art X, § 6; WASH. CONST. art. VIII, § 5.
\textsuperscript{111} COLO. CONST. art. XI, § 1.
\textsuperscript{112} See, e.g., IDAHO CONST. art. VIII, § 2; MASS. CONST. art. LXII, § 1; OHIO CONST. art. VIII, § 4; W. VA. CONST. art. X, § 6.
\textsuperscript{113} This is not necessarily the construction that would follow from a general constitutional provision. Nebraska is a good example of a state where a general provision has been given a narrow reading. Compare NEB. CONST. art. XIII, § 3 with State \textit{ex rel.} Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957).
\textsuperscript{114} Port Auth. of Saint Paul v. Fisher, 269 Minn. 275, 132 N.W.2d 183 (1964).
\textsuperscript{115} Id. at 281, 132 N.W.2d at 194.
\textsuperscript{116} Redevelopment Auth. of Madison v. Canepa, 7 Wis. 2d 643, 652, 97 N.W.2d 695, 699 (1959).
\textsuperscript{117} Connor v. Herrick, 349 Mich. 201, 216, 84 N.W.2d 427, 430 (1957).
touchstone of the construction to be applied in any given state may well be the specific language of the constitution. While some provisions expressly make themselves applicable to political subdivisions, others do not and, arguably, can be construed to have intentionally excluded such expansive coverage. 118  

3. Public Corporations

The credit of a public corporation is an item separate and distinct from the credit of the state and thus does not implicate constitutional prohibitions. The Nebraska Supreme Court, in *State ex rel. Meyer v. Duxbury*,119 raised this distinction almost in passing. Nevertheless, the appropriate application of this principle could well be determinative of any challenge to a utility financing program for conservation measures. *Duxbury* involved a challenge to the Nebraska Clean Waters Commission. The court stated that "[i]t is important to note that the commission is an agency of the state and not a separate corporation. This results in the commission being subject to constitutional requirements and restrictions that would not be applicable to a separate corporation."120 This distinction was also important to the Nebraska Supreme Court in its consideration of *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*.121 In *Mortgage Finance* the court noted that the legislation under challenge "creates a body politic and corporate, not a state agency, but an independent instrumentality exercising essential public functions, to be known as the Nebraska Mortgage Finance Fund."122 The court made much of this separate and independent existence. The bonds of that Fund were held not to invoke the credit of the state because "only the Fund is involved. It is the Fund which acquires the monies through the sale of bonds and it is the Fund which repays the bonds through revenue which it acquires."123

This Nebraska treatment of public corporations is consistent with other judicial precedent regarding public utilities. For example, Alabama124 and Georgia125 have addressed the question directly, holding that public utilities did not represent "subdivisions of the state" to which constitutional restrictions applied. In *Thompson v. Municipal Electric Authority of Georgia*,126 the Georgia Supreme Court considered a consortium of municipal governments joined together in an

118. See generally Sands, Sutherland Statutory Construction § 47.24 (1972).
120. Id. at 303, 160 N.W.2d at 91.
122. Id. at 448, 283 N.W.2d at 16 (quoting Neb. Rev. Stat. § 76-1607 (1981)).
123. Id. at 461, 283 N.W.2d at 23.
“Authority,” the creation of which was permitted by state statute.127 The court said quite simply that “the Authority is not a county, municipal corporation or political subdivision of this State.”128 Similarly, in Opinion of the Justices,129 the Alabama Supreme Court found that a public corporation created for the generation and distribution of electricity130 was not a subdivision of the state.131

4. Analysis

Both publicly-owned utilities and state governments can take very definite steps to assure that energy conservation programs involving utility financing are able to withstand constitutional scrutiny. An express disclaimer of state or municipal liability would seem appropriate in the instance of a utility issuing revenue bonds.132 Instead, the bonds would be secured by the credit of the public utility as a separate and legal entity. A pledge of private security would also seem appropriate.133 Bonds issued by a public utility are to generate funds to loan to utility consumers. The securities pledged to secure payment of those bonds can be the notes of the borrowers. The bonds and notes issued by the utility thus would actually represent the collective credit of the ratepayers who borrowed the money from the commission.134 Each of these actions is possible at the discretion of the municipal utility seeking to establish a conservation financing program.

Action by the state legislature could also enable public monies to be committed to an energy conservation financing program. The legislative creation of a state finance authority, as a separate public corporation, would not raise sustainable constitutional challenges.135 The Nebraska legislature did precisely this in its creation of the Nebraska Investment Finance Authority.136

The Nebraska Investment Finance Authority, the successor agency

127. Id. at 23, 231 S.E.2d at 725.
128. Id.
129. 294 Ala. 571, 319 So. 2d 699 (1975).
130. Id. at 575, 319 So. 2d at 703.
131. Id.
133. See supra notes 91-97 and accompanying text.
135. See supra notes 124-31 and accompanying text (discussing this principle as applied to public utility companies). See also cases cited supra note 132 (applying the principle to other types of public corporations).
to the Nebraska Mortgage Finance Fund, is legislatively authorized to pursue numerous activities. Among these are:

1. To borrow money and issue bonds as provided by the Nebraska Investment Finance Authority Act;138
2. To issue bonds for the purpose of paying the cost of financing any project or projects, and to secure the payment of such bonds as provided in the Nebraska Investment Finance Authority Act;139 [and]
3. To enter into financing agreements with others with respect to one or more projects to provide financing for such projects upon such terms and conditions as the authority may deem advisable to effectuate the public purposes of the Nebraska Investment Finance Authority Act . . . 140

The state legislature expressly included the financing of energy conservation projects within the Nebraska Investment Finance Authority Act.141 In that statute, the legislature set forth extensive findings regarding why such public financing of conservation projects constituted and furthered a public purpose.142 In addressing the "energy problems" facing the state of Nebraska, the legislature found:

1. Adequate and reliable energy supplies are a basic necessity of life and sufficient energy supplies are essential to supplying adequate food and shelter;
2. The cost and availability of energy supplies has and will continue to be a matter of state and national concern;
3. The increasing cost and decreasing availability of energy supplies for purposes of residential heating will limit the ability of many of Nebraska's citizens to provide the basic necessities of life and will result in a deterio-

137. There has not been a constitutional challenge to the powers of the Nebraska Investment Finance Authority. The fact that it is the successor agency to the Nebraska Mortgage Finance Fund, however, is significant. In State ex rel. Douglas v. Nebraska Mortgage Fin. Fund, 204 Neb. 445, 283 N.W.2d 12 (1979), the powers of that Fund were upheld. It would necessarily follow that the powers of the Investment Fund would also be sustained. See also NEB. REV. STAT. §§ 58-204 to 205 (Supp. 1983).
140. NEB. REV. STAT. § 58-239(22) (Supp. 1983).
142. NEB. REV. STAT. § 66-1001 (1981). These findings included:

(1) Our present dependence on foreign oil has created a danger to the public health and welfare and a need for a dependable source of energy;
(2) Conservation is one of the most prudent means of meeting our need for a dependable source of energy;
(3) There is an urgent and continuing need for every person and business in the state to conserve energy;
(4) There is an urgent and continuing need for capital to provide the initial investment necessary to make homes and other buildings more energy efficient;
(5) It would be prudent for our publicly-owned electric utilities to supply this needed capital in order to avoid the greater costs of constructing new generation facilities; and
(6) Involvement by our publicly-owned electric utilities in energy conservation programs serves a public purpose.

Id.
ration in living conditions and a threat to the health and welfare of the citizens of this state;

(4) Energy conservation through building modifications including, but not limited to, insulation, weatherization, and the installation of alternative energy devices has been shown to be a prudent means of reducing energy consumption costs and the need for additional costly facilities to produce and supply energy;

(5) Because of the high cost of available capital, the purchase of energy conservation devices is not possible for many Nebraskans. The prohibitively high interest rates for private capital create a situation in which the necessary capital cannot be obtained solely from private enterprise sources and there is a need for the stimulation of investment of private capital, thereby encouraging the purchase of energy conservation devices and energy conserving building modifications;

(6) The increased cost per capita of supplying adequate life sustaining energy needs has reduced the amount of funds, both public and private, available for providing other necessities of life, including food, health care, and safe, sanitary housing; and

(7) The continuing purchase of energy supplies results in the transfer of ever increasing amounts of capital to out-of-state energy suppliers.143

The legislature concluded that the Finance Authority was necessary because those problems “cannot alone be remedied through the operation of private enterprise or individual communities or both, but may be alleviated through the creation of a quasi-governmental body” to, among other things, “encourage the investment of private capital.”144

Having made these findings, Nebraska’s public utilities145 were statutorily authorized146 to make loans to owners of residential, agricultural, or commercial buildings “solely for the purchase or installation of energy conservation measures.”147 The legislature determined that these conservation loans included “an extension of credit by a utility from its own capital or from capital raised by the Nebraska Investment Finance Authority . . . .”148

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145. “Utility shall mean a publicly-owned electrical utility providing either wholesale or retail service within the state.” NEB. REV. STAT. § 66-1006 (1981).
147. These measures were defined by statute. NEB. REV. STAT. § 66-1004 (1981). The measures included:

   (1) Caulking or weatherstripping of doors or windows;
   (2) Furnace efficiency modifications involving electric service;
   (3) Clock thermostats;
   (4) Water heater insulation of modification;
   (5) Ceiling, attic, wall or floor insulation;
   (6) Storm windows or doors, multiglazed windows or doors, or heat absorbing or reflecting glazed window and door material;
   (7) Devices which control demand of appliances and aid load management; and
   (8) Such other conservation measures as the State Energy Office shall identify.

   Id.
Two possible mechanisms thus exist to allow the commitment of public funds for an energy conservation financing program. Publicly-owned utilities themselves have the means available to structure such a program. In addition, state legislative action can be taken to create a public financing program for conservation measures. In either case, no constitutional problems arise regarding lending the credit of the state.

C. Does a Conservation Financing Program Involve a Gift or Loan of Credit?

Utility conservation financing programs that involve an exchange of mutual consideration entail no loan or gift of credit of the state as contemplated by the constitutional provisions that proscribe such actions. The Nebraska Supreme Court directly faced this issue in Blue Flame Gas Association v. McCook Public Power District. In that case, the court considered a constitutional challenge to a demand promotion program that McCook public power district had developed. The court explained the program:

In the late spring of 1969, the defendant by advertisements offered to install a complete electric heating system in any home in its service area free upon the agreement of the customer to heat his home electrically for 5 calendar years. The equipment became the property of the customer after he had used it for the required 5 years, but if he failed to fulfill the agreement, the district had the right to remove the equipment.

The public power district offered this program to stimulate electricity sales during the winter, McCook's off-peak season. McCook was a purchaser of wholesale power from the Nebraska Public Power District and its purchase contract contained a ratchet clause, that is, one that works as a type of "take-or-pay" contract requiring payment for at least 70 percent of the amount of electric energy used in its peak demand month whether used or not. The court observed, “[i]n the winter months particularly, the defendant was required to pay for...

149. 186 Neb. 735, 186 N.W.2d 498 (1971).
150. Id. at 736, 186 N.W.2d at 499.
151. "Peak" demand is the "maximum actual or expected load for some period of time." W. Marsh, Economics of Electric Utility Power Generation 181 (1980).
152. The ratchet clause provides in substance that when the amount of electrical energy actually supplied by CEI exceeds the amount called for by the letter agreement, the contract demand will thereupon increase by the amount of the excess. The practical effect of this provision is that each time consumption of energy above that specified in the agreement rises to a new level, the demand charge is elevated to that new level and is never reduced, even if actual demand thereafter declines substantially.
wholesale energy for which it did not have a retail demand."\textsuperscript{154}

The court rejected, as "untenable on the facts,"\textsuperscript{155} a claim that this program involved a loan or gift of the credit of the state to an individual. The rationale of the court is clear and consistent with other state appellate courts that have addressed similar issues.\textsuperscript{156} In this situation the retail utility neither loaned nor gave anything at all. Rather, a binding contract with mutual covenants, consented to by each party, had been created. In exchange for an agreement to use off-peak electric heating, the utility provided to the customer the equipment necessary to make the conversion. Each party to the contract benefitted. The utility was able to successfully market its purchased, but heretofore unnecessary, off-peak power. The customer obtained the electric heating implements at no out-of-pocket cost.

The issue raised by the constitutional prohibition on lending the credit of the state was articulated well by the Washington Supreme Court in \textit{Public Utility District v. Taxpayers and Ratepayers of Snohomish County}.\textsuperscript{157} In that proceeding, a consortium of Washington municipalities agreed to take a 28 percent ownership share in a coal-fired power plant, with four private power companies holding the remaining 72 percent.\textsuperscript{158} The cities agreed to sell to the federal government their share of that power for the first twelve years.\textsuperscript{159} Still, the court found no unconstitutional lending of credit:

\begin{quote}
[Appellants argue that the financial participation of these public corporations in the project is 'in aid of' private corporations, for it enables the private owners to obtain additional financing, otherwise unavailable. However, even if the private owners are 'aided' by the respondents' participation, the issue is whether the aid comes in the form of gifts or loans of money or credit.]\textsuperscript{160}
\end{quote}

The court concluded that "there is no gift or loan of money or credit before us."\textsuperscript{161} It found that the utilities "in return for their investment . . . receive ownership interests commensurate to the size of their investments."\textsuperscript{162}

The Washington Supreme Court also considered the issue in a proceeding that involved transactions similar to those in the \textit{McCook} case. The court, in \textit{Washington Natural Gas Company v. Public Utility Dis-}

\begin{itemize}
\item \textsuperscript{154} Id.\textsuperscript{155} Id. at 739, 186 N.W.2d at 501.
\item \textsuperscript{157} 78 Wash. 2d 724, 479 P.2d 61 (1971).
\item \textsuperscript{158} Id. at 725-26, 479 P.2d at 62.
\item \textsuperscript{159} Id. at 730, 479 P.2d at 65.
\item \textsuperscript{160} Id. at 727, 479 P.2d at 63.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Id.
\end{itemize}
trict No. 1 of Shohomish County,\textsuperscript{163} upheld the principle that in the event that mutual considerations are exchanged, no loan or gift of the credit of the state is involved in a transaction. In Washington Natural Gas, a natural gas distributor sought to restrain a county public utility district from offering inducements to encourage land developers to install underground electrical distribution systems. The utility district sought further to persuade homeowners in new housing developments to buy electrical energy and service.\textsuperscript{164}

The inducements were contained within a contract offered by the utility district to the land developer whereby the utility offered to install, at its own initial expense, a complete underground electric distribution system and an ornamental street lighting system.\textsuperscript{165} In turn, the developer agreed to pay $225 per lot to the utility within three years of the date of the agreement, with interest at 6 percent on the unpaid balance.\textsuperscript{166} If, however, the developer erected a "total electric dwelling" within that three year period, the utility agreed to provide a $150 credit or payment to the $225 contractual amount.\textsuperscript{167} The gas company challenged this promotional scheme, asserting that it involved unconstitutional gifts and an improper granting of public credit.

The Washington court rejected that challenge. In so doing, it looked to see whether there was, in fact, "a beneficial contract" with "genuine mutuality."\textsuperscript{168} The court found that:

\begin{quote}
Not only is there an abundance of consideration moving directly to the PUD in the instant case to support its offer of a contract, but there will be an actual delivery of property and acquisition of ownership by the PUD in addition to the sale of electricity which will be made under the contract.\textsuperscript{169}
\end{quote}

The utility, the court said, stood to gain "measurable benefits" from the contractual arrangement.\textsuperscript{170} It would, among other things, "acquire a substantial number of total electric customers who will purchase from it greater amounts of electrical energy than ordinary customers."\textsuperscript{171} As a result, the court concluded, "there is . . . no lending of money or credit . . . but rather a genuine exchange of concrete, specific measurable consideration."\textsuperscript{172}

The reasoning of these cases is well-adapted to the contemporary

\begin{thebibliography}{99}
\item 164. \textit{Id.} at 100, 459 P.2d at 636-37.
\item 165. \textit{Id.} at 99-100, 459 P.2d at 636-37.
\item 166. \textit{Id.}
\item 167. \textit{Id.}
\item 168. \textit{Id.} at 102, 459 P.2d at 638.
\item 169. \textit{Id.} at 103, 459 P.2d at 638.
\item 170. \textit{Id.} at 103, 459 P.2d at 638-39.
\item 171. \textit{Id.}
\item 172. \textit{Id.} at 103-04, 459 P.2d at 639.
\end{thebibliography}
energy situation as well. The Washington case was decided in 1969,\textsuperscript{173} the Nebraska case in 1971.\textsuperscript{174} During this era, electricity was a cheap source of energy and, by increasing demand, a utility could pass on to all of its customers the benefits gained through economies of scale in power generation.\textsuperscript{175} That situation has changed dramatically. Higher construction costs, higher capital costs, and higher environmental costs have all contributed to drive the price of new capacity additions substantially upward.\textsuperscript{176} Moreover, state and federal policymakers are recognizing the need to conserve fossil fuels, including natural gas, oil, and coal.\textsuperscript{\textsuperscript{177}} The United States Supreme Court held recently that "[w]e accept without reservation the argument that conservation, as well as the development of alternate energy sources, is an imperative national goal. Administrative bodies empowered to regulate electric utilities have the authority—and indeed the duty—to take appropriate action to further this goal."\textsuperscript{178} Similarly, the Nebraska legislature has found that "adequate and reliable energy supplies are a basic necessity of life," and that "the cost and availability of energy supplies has been and will continue to be a matter of state and national concern."\textsuperscript{179} The legislature concluded that "energy conservation... has been shown to be a prudent means of reducing energy consumption costs and the need for additional costly facilities to produce and supply energy."\textsuperscript{180}

Today, therefore, the recognized need of the prudent utility is to \textit{decrease}, not to \textit{increase}, demand for electricity. To the extent that a utility can purchase the decreased demand through the implementation of conservation technologies by its customers, the company receives a "genuine exchange of concrete, specific measurable consideration" as it did when the need was otherwise nearly two decades ago.\textsuperscript{181} In such a situation, the provision of utility financing for

\begin{itemize}
  \item \textsuperscript{173} Id. at 94, 459 P.2d at 633.
  \item \textsuperscript{174} Blue Flame Gas Ass'n v. McCook Pub. Power Dist., 186 Neb. 735, 186 N.W.2d 498 (1971).
  \item \textsuperscript{175} C. KOMANOFF, supra note 2, at 14-44.
  \item \textsuperscript{176} \textit{See supra} notes 2-5 and accompanying text.
  \item \textsuperscript{177} \textit{See supra} notes 10-15 and accompanying text.
  \item \textsuperscript{178} Central Hudson Gas Co. v. Public Serv. Comm'n, 447 U.S. 557, 571 (1980).
  \item \textsuperscript{179} NEB. REV. STAT. § 58-202(3) (Supp. 1983).
  \item \textsuperscript{180} Id.
  
  Language in the Washington Supreme Court case, however, raises the issue of whether there is an adequate consideration to avoid constitutional constraints in the context of "buying" energy conservation in the event that the utility provided subsidized, i.e., lower than market cost, interest rates. In Washington Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County, 77 Wash. 2d 94, 459 P.2d 633 (1969), the court spoke of the constitution prohibiting, as a lending of the state's credit, the provision of "short term credit" that allowed "the customer to
the installation of such conservation measures, like the Nebraska and Washington programs discussed above, would not invoke the constitutional proscription of making a loan or a gift of the state's credit.

IV. Conclusion

Recent dramatic increases in electric utility rates have given rise to concern about the continuing efficacy of a sole reliance upon the provision of energy services through traditional means. With various factors driving the cost of new central station generation progressively higher, increased electric demands that lead to the need for new power plant construction virtually assure further increases in future electric rates.

One alternative to this scenario, which has been proffered in the past, has been to transform the utility industry into providers of full energy services. As such, those companies would, in addition to providing traditional energy from fuels such as oil, natural gas, and coal, offer the "energy services" of conservation as well as load management and renewable resource devices. The utility industry, however, has vigorously opposed regulatory efforts attempting to move the industry in this direction. One recurring focal point of confrontation has been whether state regulators have the authority to compel utility companies, against their will, to provide financing for alternative energy services.

Recently, however, utility analysts have begun to recognize the benefits to the industry that inhere in the move toward energy conservation and other demand-side alternatives. Increased capital flexibility and increased financial security to the industry are welcome prospects in a time of high interest rates, uncertain demand, and multi-billion dollar construction costs. Yet even while the industry develops a newly found enthusiasm for promoting nontraditional energy strategies, including incorporating the use of utility financing

convert this concession into a profitable hypothecation of credit with third persons." Id. at 104, 459 P.2d at 639. However, this potential problem should provide no barrier to interest rate reductions in financing programs offered by publicly-owned utilities. The question of whether a reduced interest rate would, in itself, constitute "lending the credit of the state" in violation of constitutional restrictions should be answered by application of the analysis offered throughout this Article. In addition, utilities on the local level, or state legislatures, could make findings such as those made by the Nebraska legislature. That assembly found "[b]ecause of the high cost of available capital, the purchase of energy conservation devices is not possible for many Nebraskans. The prohibitively high interest rates for private capital create a situation in which the necessary capital cannot be obtained solely from private enterprise sources . . . ." NEB. REV. STAT. § 58-202(3)(e) (Supp. 1983).

For other discussions of how "conservation subsidies" such as reduced interest rates are consistent with accepted ratemaking principles, see Schroeder & Miller, supra note 7, at 1027-29.
programs, concerns have arisen over the ability of publicly-owned utilities, such as municipal utilities, to provide such programs.

Most states have constitutional provisions restricting the loaning of the credit of the state to private interests. In at least two states, legal opinions have been rendered indicating that these constitutional restrictions proscribe having publicly-owned utility companies implement conservation financing programs for their customers. Under this analysis, even a willing utility would be barred from making such financing available.

This Article has examined that conclusion in detail and found that the constitutional provisions in question provide no such bar. The historical purpose of the constitutional limit was to prevent state governments from providing venture capital to new industry such as frontier railroads. The provision of energy conservation financing implicates no such policy. Moreover, in order for the constitutional provisions to be applicable, three elements must first be demonstrated. First, there must be "credit" involved; second, the credit must be that "of the state"; and third, the credit must be given or loaned. All of those elements have been examined as they regard an energy conservation loan program, and, each has been found to be wanting.

A state constitutional provision restricting the loan of the credit of the state provides no barrier to the offer of an energy conservation financing program by a publicly-owned utility.